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No. _____

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC., Appellants,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION and PACIFIC GAS & ELECTRIC COMPANY, Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Commerce Clause of the United States Constitution requires the California Public Utilities Commission to authorize sales of electrical power to a California public utility by small power producers and cogenerators situated in the States of Oregon and Washington on the same terms and conditions as are afforded to small power producers and cogenerators situated in the State of California.

2. Whether the Contract Clause of the United States Constitution has been violated by an order of the California Public Utilities Commission directly abrogating several contracts for the sale of electrical power to a public utility by small power producers and cogenerators, where these contracts had been entered into in strict accordance with previously adopted rules of the Commission and where the Commission had previously declared that such contracts "will not be subject to retroactive change."

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OPINIONS BELOW

The judgment appealed from was rendered without opinion and is not reported. A copy is attached hereto as Appendix A. The order of the California Public Utilities Commission which is affirmed by the judgment below is also unpublished. A copy of the order and supporting opinion is attached as Appendix B. Excerpts from other relevant orders of the Commission are reprinted in Appendices C through M.

JURISDICTION

The administrative order whose constitutionality is drawn in question in this case purports to enunciate a general rule governing the sale of electrical power to California public utilities by out-of-state power producers (App. B, pp. 16-18). The order is therefore a "statute of [a] state" within the meaning of 28 U.S.C. §1257 as that term has previously been interpreted by this Court. Lathrop v. Donohue, 367 U.S. 820, 824-25 (1961); Hamilton v. Regents, 293 U.S. 245, 257-58 (1934); Sultan R. & T. Co. v. Dept. of

Labor, 277 U.S. 135, 136 (1928). The judgment of the California Supreme Court denying appellants' petition for review of the Commission's order is a decision on the merits sustaining the validity of the order. Cal. Pub. Util. Code §§1757, 1760; Atchison, Topeka & S.F.R.R. v. Public Utilities Comm., 346 U.S. 346, 348-49 (1953); Napa Valley Elec. Co. v. Railroad Comm., 251 U.S. 366, 372-73 (1920); Pacific Tel. & Tel. Co. v. Public Utilities Comm., 600 F.2d 1309, 1311-14 (9th Cir. 1979); Consumers Lobby v. Public Utilities Comm., 25 Cal.3d 891, 603 P.2d 41, 46 (1979). Jurisdiction of this appeal from that judgment is therefore conferred on this Court by the provisions of 28 U.S.C. §1257(2). Atchison, Topeka & S.F.R.R. v. Public Utilities Comm., supra. The judgment below having been entered on July 30, 1986, and the Notice of Appeal from the judgment having been filed on October 15, 1986, this appeal has been timely perfected pursuant to the provisions of 28 U.S.C. §2101(c). A copy of the Notice of Appeal is attached as Appendix R.

STATUTES INVOLVED

In addition to the several regulations and directives of the California Public Utilities Commission reprinted in Appendices B through M, the constitutional provisions, statutes, and regulations involved in this case are the Commerce Clause and the Contract Clause of the United States Constitution, and the federal statutes and regulations governing the sale of electrical power by small power producers and cogenerators that are codified in 16 U.S.C. §824a-3 and 18 C.F.R. §§292.302-304. Pertinent excerpts from these provisions are set forth in Appendix Y.

INTRODUCTORY STATEMENT

Appellant Hydropool is a partnership of which appellant Cogeneration Services, Inc., is one of the partners. Hydropool is a part owner of two small electrical generation projects in the State of Oregon, and either owns the rights to, or possesses an exclusive marketing agency for, the power produced by several other small producers and cogenerators located in Oregon and Washington. All of these projects have

satisfied the criteria for becoming "qualifying facilities" within the meaning of the federal statutes and regulations requiring state public utility commissions to develop rules for the mandatory purchase of electric power from cogenerators and small power producers by public utilities within their jurisdictions. 16 U.S.C. §824a-3; 18 C.F.R. §§292.203-7. See American Paper Inst. v. American Elec. Power Corp., 461 U.S. 402, 403-5 (1983).

Hydropool is seeking to sell the power produced by its projects to appellee Pacific Gas and Electric Company ("PG&E"), a California public utility, in accordance with the rules that have been prescribed for such sales by appellee California Public Utilities Commission ("the Commission") pursuant to its federal mandate. For each of these projects, Hydropool has formally accepted one of the "standard offers" for the purchase of power that have been extended to qualifying facilities by PG&E in compliance with the Commission's regulations and has thus satisfied all of the conditions mandated by those regulations for the formation

of a binding purchase contract with PG&E.

PG&E has nevertheless refused to purchase power from Hydropool pursuant to these contracts, and this refusal has been sustained by the Commission in the decision that is challenged in this proceeding. The stated reason for the Commission's decision is that purchases of power from Hydropool and other out-of-state qualifying facilities would be disadvantageous to California's ratepayers because such power would be delivered over an interstate transmission line having a limited transmission capacity, and would thus displace, under certain conditions, imports of hydroelectric power from various Northwest utilities that would otherwise be available at prices somewhat lower than those prescribed in the "standard offer" for purchases of power from qualifying facilities. On the basis of this rationale, the Commission, in its decision, has retroactively abrogated Hydropool's purchase contracts with PG&E, denied Hydropool the right to sell its power to PG&E at "standard offer" prices, and directed

the commencement of a separate investigation of "the general question of the terms and conditions, if any, under which out-of-state QFs [qualifying facilities] should be allowed interconnection" to PG&E's transmission facilities (App. B, pp. 17a-18).

Hydropool contends that this decision violates both the Commerce Clause and the Contract Clause of the federal Constitution. In support of its challenge under the Commerce Clause, Hydropool points to the undisputed fact that other qualifying facilities, which are located in California, are presently selling to PG&E, with the sanction of the Commission and at "standard offer" prices, power which must be delivered over the same constrained interstate transmission line that would be used for the delivery of Hydropool's power, and which therefore causes a displacement of economical imports from the Northwest of precisely the same sort that would be caused by Hydropool's deliveries. In light of this fact, Hydropool submits that the Commission's decision upholding PG&E's refusal to accept its

deliveries amounts to blatant discrimination against interstate commerce that cannot be sustained on the rationale espoused by the Commission or on any other legitimate rationale.

Hydropool's further challenge to the Commission's decision under the Contract Clause is based on the earlier rulings of the Commission establishing the conditions for the formation of binding purchase contracts between qualifying facilities and California public utilities. In those decisions, the Commission repeatedly declared that a qualifying facility's acceptance of a "standard offer" promulgated by a utility pursuant to the Commission's directives would result in "a complete contract" which "will not be subject to having terms or prices changed later" or to "retroactive change based on prospective developments" (App. C, p. 23; App. D, p. 3; App. E, pp. 3, 39; App. K, pp. 27-29). In this regard, the Commission specifically renounced its own authority to modify such contracts by declaring that "we recognize that

we cannot order retroactive changes to [standard offer] contracts," but that "we are willing to commit to that loss in flexibility" in the interest of encouraging investment in cogeneration and small power production (App. E, p. 40; see App. K, p. 29). Despite these commitments, and despite Hydropool's intervening investment of substantial sums in power production facilities in reliance on these commitments, the Commission, by the decision challenged herein, has not only modified, but has entirely abrogated, all of the "standard offer" contracts which Hydropool has entered into with PG&E pursuant to the previous regulations of the Commission. Hydropool submits that, if the constitutional guarantee against state action "impairing the Obligation of Contracts" retains any force at all, it must be deemed to nullify this breach of faith on the part of the Commission.

The issues raised by both of these contentions are sufficiently substantial to warrant plenary consideration by this Court. Judicial censure of the Commission's parochial

and discriminatory treatment of out-of-state power producers is necessary to prevent frustration of the expressed congressional objective of promoting small power production on a national scale as a means of contributing to the goal of national self-sufficiency in the production of electrical energy. Judicial reproof of the Commission's abrogation of Hydropool's constitutionally protected contractual rights would likewise advance a significant goal, inasmuch as the Commission's action in this regard is sufficiently flagrant to afford the Court an exemplary opportunity to reaffirm its commitment to the important values subserved by the Contract Clause.

STATEMENT OF THE CASE

1. Statutory and Regulatory Background. The statutory foundation of the transactions and proceedings at issue in this case is the provision of the Public Utilities Regulatory Policies Act of 1978 ("PURPA") that mandates the purchase of power by public utilities from cogenerators and small power producers. 16 U.S.C. §824a-3. This provision of the Act has

been described in two prior opinions of this Court and need not be exhaustively recounted here. American Paper Inst. v. American Elec. Power Corp., supra; FERC v. Mississippi, 456 U.S. 742, 750-51 (1982). In brief, the operative sections require the Federal Energy Regulatory Commission ("FERC") to issue rules establishing, within certain general guidelines prescribed by the Act, the terms and conditions for such purchases of power, and further require the regulatory commissions of the various states to undertake the implementation and enforcement of these rules. 16 U.S.C. §§824a-3(a), 824a-3(f)(1).

The legislative history reveals that the overall purpose of the Act, including the provision relating to small power production, was to resolve an "energy problem [that] was nationwide in scope" and to "lessen the ... dependence on foreign oil" that was viewed as "seriously jeopardiz[ing] the Nation's economy and ... undermin[ing] the independence of the United States." FERC v. Mississippi, supra at 745-46, 755-57 (quoting pertinent legislative

materials). An equally significant feature of the legislative history, for present purposes, was Congress's express recognition of the imposing risks that had previously discouraged investment in cogeneration and small power production, and the consequent need for special incentives and assurances to reduce such risks and thereby promote such investment. H.R. Conf. Rept. No. 95-1750, pp. 97-98 (1978). See American Paper Inst. v. American Elec. Power Corp., supra at 406, 414; 45 Fed.Reg. 12224 (1980).

Pursuant to its congressional mandate, FERC has adopted detailed regulations governing the terms and conditions for the purchase of power from cogenerators and small power producers, who are collectively referred to in the regulations as "qualifying facilities." 18 C.F.R., part 292. These regulations provide that the price to be paid for such purchases shall be the purchasing utility's "full avoided cost" - that is, the cost which the utility would have incurred by generating the same amount of power itself or purchasing the power

elsewhere. 18 C.F.R. §292.304(b)(2). See American Paper Inst. v. American Elec. Power Corp., supra at 406. Computation of the amount of each utility's full avoided cost is delegated by the regulations to the appropriate regulatory authorities of each state, who are also charged with resolving any disputes arising in the course of the implementation of the regulations and with carrying out various other administrative tasks. 18 C.F.R. §§292.302(d)-(e), 292.303(b).

The FERC regulations confer on each qualifying facility an option to commit itself to a long-term contract for the supply of power to a utility at a price to be dictated by an estimate of the utility's average avoided costs over the life of the contract. Id., §292.304(d)(2). In addition, the regulations prohibit a utility from refusing to accept deliveries from a qualifying facility on the basis of "temporary operational circumstances" except under conditions of "negative avoided cost" - that is, when the acceptance of such deliveries would "result in costs greater than

those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself." Id., §292.304(f). Finally, the regulations require utilities to accept sales of power from qualifying facilities located outside their service territories under arrangements whereby the power is "wheeled" to the purchasing utilities over the transmission lines of the other utilities in whose service territories the qualifying facilities are located. Id., §292.303(d).

The comments accompanying the issuance of the FERC regulations make clear that this last provision - requiring the acceptance of power deliveries from outside the purchasing utility's service area - specifically contemplates that qualifying facilities may take advantage of differences in the avoided-cost rates established for different utilities by the various state regulatory commissions by "wheeling" power over interconnecting transmission lines to utilities having higher rates than the utilities to which the original

connections are made. 45 Fed.Reg. 12219, 12221 (1980). These same comments also reiterate the congressional goal of reducing the financial risks of investment in small power production projects by emphasizng "the need for certainty with regard to return on investment" in such projects as a major factor in the development of any federal or state regulation establishing the terms and conditions for purchases of their power output. Id. at 12224; see also id. at 12218.

2. The Initial Regulations of the Commission. To carry out its responsibility under PURPA and the FERC regulations to develop prices and other terms for the purchase of power from qualifying facilities (or "QFs" as they came to be known in the Commission's regulations), the California Commission developed a device called a "standard offer." This was a prescribed form of fixed-price contract that the utilities were required to offer to all QFs seeking to sell power to them, and that was intended to become a legally binding mutual agreement immediately upon its

written acceptance by a QF (App. C, pp. 23-28; App. D, p. 3; see App. K, p. 29). The QFs were given a choice among several separate such "standard offers," which varied according to the price to be paid for the power, the duration of the contract, the extent of the obligations assumed by the QF with respect to guaranteed power deliveries, and various other terms and conditions (App. D, p. 3). Standard Offer No. 4, which is the particular agreement at issue here, provided for a firm delivery commitment by the QF and fixed long-term pricing based on the utility's forecast of its average system-wide avoided cost over the life of the contract (App. E, pp. 3-4).

In developing the terms of these standard offers and the rules governing their use, the Commission resolved several key issues of special significance to the present controversy. First, consistently with the FERC regulations, the Commission required each utility to extend its standard offers to all QFs wishing to sell power to it, regardless of whether they were located within or without the

utility's service area, and to accept "wheeled" power from out-of-area QFs on the same terms as those made available to QFs connecting directly with the utility's transmission system (App. C, pp. 108-12). In support of its ruling to this effect, the Commission expressly found that "it is not prudent for a utility to fail to pursue an otherwise beneficial facility simply because it is located in another service territory," that "the attractive feature of wheeling is that it introduces actual competition into the market," and that "wheeling is an important concept that can make a material contribution to cogeneration and small power production in California" (id., p. 110).

Secondly, the Commission rejected a request by the utilities for authority to refuse deliveries of QF power whenever load conditions were such that these deliveries would necessarily displace lower priced "economy power" from Northwest hydroelectric plants. The Commission correctly discerned that the FERC regulations did not permit refusals of QF deliveries on this ground, inasmuch as they

expressly restricted the circumstances justifying such refusals to those in which acceptance of QF power would "result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself" (App. C, pp. 72-73, 78, quoting 18 C.F.R. §292.304(f)). The Commission accordingly ruled that a utility's access to economy power from outside sources would not be viewed as a valid reason for refusing to purchase QF power, and that this factor should instead simply be taken into account in computing the utility's system-wide average avoided cost for the purpose of setting the price for purchases of power in its standard offer (App. C, pp. 72-78; App. D, p. 114; App. E, p. 38). As the Commission put it, "[a]nticipated economy purchases [are] to be averaged in the avoided cost applied for the entire time period" of the contract with each QF, and therefore "[t]here is no basis for refusing to purchase from such QFs merely because actual avoided costs occasionally go

below published prices" during periods when economy power is available (App. C, p. 78; App. D, p. 114).

Finally, the Commission went out of its way to assure QFs that their acceptance of a utility's standard offer would create a binding contract that would not be subject to retroactive abrogation or alteration. The Commission's ruling to this effect was based on its express recognition, echoing the similar concerns previously expressed by FERC and the draftsmen of PURPA, that "lenders and equity investors are reluctant to commit capital when a [QF] project's payment stream is ... uncertain" (App. E, p. 3). On the basis of this perception, the Commission specifically rejected a proposal by the utilities to include in their standard offers a "regulatory authority clause" that would have acknowledged the Commission's power to dictate retroactive changes in the terms of their purchase contracts with QFs (id., pp. 39-40). In that regard, the Commission stated (id.):

"In view of our holding that contracts

> entered into under Standard Offer #4 will not be subject to retroactive change based on prospective developments in the continuing saga of pricing QF power, we think the regulatory authority clause should be deleted. ... QFs contend that with the regulatory authority clauses in the contracts ... there will be insurmountable hesitation by lenders because of uncertainty. In ordering the clause removed we recognize that we cannot order retroactive changes to interim Standard Offer #4 contracts but ... we are willing to commit to that loss in flexibility."

This promise by the Commission to refrain from retroactive alteration of an accepted standard offer was thereafter repeatedly reaffirmed in several of the Commission's subsequent rulings (e.g., App. F, p. 64; App. K, pp. 27-29).

In reliance on these assurances and these rulings of the Commission, and on the consequent prospect of prices for QF power much higher than those that were available in the power-rich Northwest, Hydropool commenced the development of its interests in its various projects in Oregon and Washington with a view toward eventual sale of their power output to PG&E (App. S, pp. 3-4, 7-8). Hydropool's efforts in this regard consisted of securing financial commitments, assuring compliance of

its projects with the FERC definition of "qualifying facilities," consulting with PG&E about its development plans, and making arrangements for "wheeling" its power output to PG&E over the lines of other utilities (id., pp. 3-5, 8-10). These activities entailed the expenditure of substantial sums, which amounted to some $630,000 by the time of the Commission hearing in the proceeding that is under review here (id., p. 4).

3. PG&E's Transmission Constraints and the "Interim Solution". In the meantime, it had come to the Commission's attention that PG&E was experiencing serious transmission capacity constraints which it felt had been exacerbated by its obligation to accept deliveries of QF power (App. F, pp. 59-61). These problems affected nearly all of PG&E's bulk and area transmission lines in its northern territory, including, among others, the Pacific Northwest-Southwest Intertie ("the Intertie"), a 500KV interstate transmission line that runs from Washington through California and that serves as the vehicle for power deliveries to PG&E

from the Northwest utilities (App. U, pp. 3-11). After initially chastising PG&E for its belated disclosure of these difficulties and its failure to anticipate them in its transmission planning, the Commission ordered an investigation of the matter, with the declared objective, among others, of developing interim procedures for permitting QF development to go forward in PG&E's northern territory while PG&E undertook any enhancements to its transmission system that the Commission might find necessary to effect a permanent resolution of this problem (App. F, pp. 59-69, 99-100; App. G, pp. 42-50, 54-59).

The immediate product of this investigation was the so-called "interim solution," which was an arrangement originally developed at a negotiating conference among PG&E, the Commission's staff, and an association of California QFs known as the Independent Energy Producers (or "IEP") (see App. H, pp. 2-5). At that conference, the parties entered into a stipulation which required PG&E to undertake certain short-term capacity enhancements that

would permit its system to accommodate a limited additional quantity (initially 990 MW, later raised to 1150 MW) of QF power in return for the QFs' agreement to share in the cost of these measures according to a certain formula (id., p. 4). PG&E agreed that, on these conditions and pending the Commission's final decision regarding necessary permanent transmission enhancements, it would accept additional purchases of QF power, up to the specified limits, on a first-come-first-served basis (id.). By its terms, however, the stipulation was limited to QFs located in PG&E's service territory (id., pp. 7-8).

Hydropool and certain California QFs located beyond PG&E's service boundaries naturally objected to this latter condition and therefore requested that the Commission modify the stipulation to include out-of-area QFs (see id., pp. 7-8). PG&E opposed this request on the basis of its assertion that "unlimited amounts of QF power from outside PG&E's service territory could displace large amounts of more economic power" (id.). The Commission rejected

this argument and granted the request, finding that any additional displacement of economy power that might result from the inclusion of out-of-area QFs would necessarily be limited by the overall restriction on the total amount of QF power that PG&E was obligated to accept under the terms of the stipulation (id., pp.8-9). The Commission's ruling on this issue was as follows (id.):

> "We find that any interim solution should be afforded to all QFs affected by potential transmission constraints in PG&E's northern system. At this time, we do not have sufficient cause to differentiate between QFs located within PG&E's service territory and those located beyond the utility's service boundaries. Both groups are willing to deliver power to PG&E's system under the same pricing formulas. ... We believe, as does PG&E in its planning, that there is no meaningful distinction between these QFs and will modify the stipulation as requested. ... However, we also find merit in the concern expressed by the Commission staff and PG&E that unlimited amounts of QF deliveries from outside PG&E's service territory could displace large amounts of more economic power. ... This problem can be solved by specifying a maximum level of QF development that may be interconnected under the interim solution. ... We will choose as the maximum level the total of the area capacity limitations agreed to by the negotiating parties in the stipulation or 990 MW. ... Subject to these ... modifications, we approve of the stipulation negotiated by the Commission staff, PG&E, and QF representatives and will adopt it as

an interim solution."

During these proceedings, several of Hydropool's projects had reached a stage of development sufficient to permit the acceptance of standard offers and the formation of contracts with PG&E (App. T, exhs. 13A, 13C). Shortly after the Commission's decision approving the inclusion of out-of-area QFs in the interim solution, therefore, Hydropool formally accepted and tendered to PG&E executed Standard Offer No. 4 contracts for seven of its projects, accompanied by a check for its share of the costs assessable against it under the Commission's rulings (id., exh. 13C). Although conceding that these contracts had been submitted in time to entitle Hydropool to a portion of the maximum purchase allotment permitted under the interim solution, PG&E nevertheless refused to accept the contracts (id., exh. 19). Instead, it immediately filed a petition, in which IEP also joined, asking the Commission to modify its recent ruling in such a way as to exclude all of Hydropool's projects from participation in the interim

solution (App. N).

The particular modification of the ruling sought by PG&E and IEP was the exclusion of all "QFs located outside of PG&E's service territory whose power output would flow on the Pacific Northwest-Pacific Southwest Intertie north of Round Mountain Substation" (App. N, p. 5). This was a euphemism for the exclusion of QFs located outside the state, because the only point of connection to the Intertie "north of Round Mountain Substation" was PG&E's Malin substation at the Oregon-California border, which was the only point at which power flowing from QFs in Washington or Oregon could practicably enter PG&E's transmission system, and which was not a practicable connection point for any QF located in California (App. U, att. 1).

Besides calling attention in this way to the out-of-state location of Hydropool's projects, PG&E and IEP offered no support for their petition to overturn the Commission's recent ruling other than the bare assertion that "the parties who negotiated the interim

solution never intended" that it would apply to projects connecting with the Intertie north of Round Mountain (App. N, p. 3). Nevertheless, in its initial ruling on the petition, the Commission declared that the question raised therein appeared to be "a significant matter" involving "broad policy questions" that could not be resolved without a full-scale evidentiary hearing (App. I, p. 5). The Commission accordingly directed that such a hearing should be conducted before an administrative law judge in conjunction with the ongoing hearings in the still pending investigation into possible final solutions to the overall problem of PG&E's transmission constraints (id.).

4. Suspension of Standard Offer No. 4 and the "Orphan Contracts" Decision. Ten months ultimately elapsed between the filing of PG&E's and IEP's petition for modification of the interim solution and the Commission's eventual decision on the merits of that petition, during which Hydropool's projects languished in limbo (App. S, pp. 10-11). Meanwhile, however, there

occurred another development that was to have an even more drastic effect on these projects. Five months after the filing of PG&E's and IEP's petition, the Commission suspended Standard Offer No. 4 in its entirety pending a long-term investigation looking toward a reduction in the prices to be paid to QFs under that offer (App. J, p. 3). The basis for the Commission's action was its finding that the recent decline in fuel prices and the increases in generating capacity arising from the unexpectedly high level of QF development had reduced the utilities' actual avoided costs to a level below the prices for QF power fixed in the standard offer (id., pp. 15-16, 22-23).

Some advance warning had been given of the impending suspension of Standard Offer No. 4, and more than 200 additional QF contracts had therefore been executed and tendered to the utilities immediately prior to the entry of the suspension order, among which were seven additional contracts tendered by Hydropool (App. K, pp. 5,7). To avoid prolonging what it called this "gold rush" of last-minute

contracts, the Commission declared that its order announcing the suspension would be made effective immediately (App. J, p. 3). The Commission also made clear, however, that the order would only apply prospectively, and that it was accordingly not intended to nullify any standard offer contract that had actually been executed prior to the date of the order (id., pp. 32-33).

A controversy nevertheless arose regarding the application of the suspension order to several contracts that were in various states of completion on the date of its entry (App. K, pp. 2-7). The utilities maintained that an effective contract had not been formed as of that date in any case where the utility itself had not yet countersigned the QF's executed standard offer, where the offer had been executed by the QF without curing various alleged imperfections in its form, or where the utility had not yet completed the "interconnection study" and "special facilities agreement" that it was required to carry out for each QF contract under the Commission's

rules (id., pp. 4-7, 18-20). Among the contracts challenged in this manner were all of the contracts tendered by Hydropool, including not only those that had been executed immediately before the suspension order, but also the seven contracts that had been tendered to PG&E several months earlier and were being held in abeyance pending the outcome of PG&E's and IEP's petition to modify the interim solution (id., p. 19).

In what came to be known as its "orphan contracts" decision (App. K), the Commission rejected all of the utilities' contentions on these issues - with one notable exception. Reiterating its earlier rulings to the effect that a QF's mere execution of a standard offer was sufficient to create a "complete contract" that would "not be subject to retroactive change" through the exercise of the Commission's "regulatory authority" or otherwise, the Commission generally held that all standard offers executed by QFs prior to the date of the suspension of Standard Offer No. 4 were binding contracts which were not

affected by the suspension, and that any imperfections in the terms of any of these contracts, including the lack of a completed "interconnection study" or "special facilities agreement," would be subject to cure within a reasonable time after the date of its decision (id., pp. 23-37). The same result was reached regarding two projects for which the QFs had not even signed the standard offer as of the critical date, with respect to which the Commission found that effective contracts had nevertheless been formed because the QFs had clearly indicated that they were ready to sign the standard offer and had only been prevented from doing so by various actions or representations of the utilities (id., p. 37; App. M).

When it came to what it called the "special case" of Hydropool, however, the Commission chose a different tack. Finding that the validity of Hydropool's contracts could not be determined without addressing the merits of PG&E's and IEP's still pending petition to exclude Hydropool's projects from the interim

solution, the Commission held simply that "[t]he ability of Cogeneration Services, Inc., and Hydropool to enter such agreements should be determined by the decision in that proceeding" (App. K, p. 44). The Commission otherwise declined to discuss the status of any of the contracts that had been tendered by Hydropool (id., pp. 37, 44).

5. Abrogation of Hydropool's Contracts. Simultaneously with the proceedings surrounding the suspension of Standard Offer No. 4, the parties were engaged in conducting the consolidated evidentiary hearings ordered by the Commission on the status of Hydropool's projects and the long-term solution to PG&E's transmission constraints. In those hearings, PG&E and IEP, obviously mindful of the constitutional difficulties that would attend a straightforward exclusion of out-of-state QFs from the terms of the interim solution, attempted to support their request for this relief by adducing evidence of two other alleged distinguishing factors that they claimed would justify the exclusion of

Hydropool's projects.*

First, they pointed out, through testimony of PG&E's employees, that Hydropool's output would enter PG&E's system on the Intertie at a point where no other PG&E transmission lines were connected, that it would therefore necessarily flow on the Intertie at least as far as the next substation at Round Mountain, and that it would thus displace economy power from the Northwest utilities "on a one-to-one basis" during those limited times in which the capacity of the Intertie would otherwise be entirely occupied with the transmission of these low-priced imports (App. W, pp. 71, 78; App. X, p. 18). By contrast, according to these witnesses, the output of all other QFs entered the system at points at which other

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* PG&E also raised certain technical objections to the validity of Hydropool's contracts, contending, for example, that the terms of Standard Offer No. 4 were not appropriate for out-of-area QFs and that the contracts were not valid until agreement had been reached on interconnection facilities (App. K, p. 19; App. O, pp. 3-4). These contentions were patently unsound, having been rejected by the Commission, as noted above, on numerous prior occasions, and they were accordingly ignored by both the administrative law judge and the Commission (see Apps. B, O).

PG&E transmission lines could be used to divert or withhold their output from the Intertie in order to avoid this sort of displacement effect whenever sufficient excess capacity on those other lines was available for this purpose (id.; App. X, pp. 46, 371).

These same witnesses admitted, however, that this supposed special feature of Hydropool's projects was of very little, if any, practical significance. They conceded that, whenever the capacity of the Intertie was so overloaded that the acceptance of QF power would cause a displacement of economy imports, it was likely that most of PG&E's other area and bulk transmission lines would be similarly overloaded, and that these lines therefore would often be unavailable to prevent the displacement of economy power by diverting QF power from the Intertie (App. U, pp. 9-10; App. V, pp. 4, 6; App. X, pp. 37, 49, 52, 358-65, 368-72). The result of this fact, these witnesses admitted, was that the output of the California QFs would ordinarily flow onto the Intertie and displace economy imports under

most of the same conditions and in the same manner as would Hydropool's output (id.). Indeed, it was conceded that the total financial effect on California's ratepayers of the displacement thus caused by the 1150 MW of additional power already allotted to California QFs under the interim solution would be vastly greater than anything that might ensue from the addition of Hydropool's output of only 66.2 MW (id.; App. U, p. 16).

The second ground proffered by PG&E and IEP for distinguishing Hydropool's projects was likewise shown to be insubstantial. They pointed out, in this regard, that the short-term capacity enhancements contemplated by the interim solution encompassed only the area transmission lines on which the California QFs' output would enter the system and excluded any enhancements to the Intertie such as would be necessary to accommodate additional QF power on that line (App. W, p. 91; App. X, pp. 16, 37, 40). This fact, while true, was obviously incapable of justifying any differential treatment of Hydropool, however, because, as

noted above, the power output of the California QFs would overflow onto the Intertie in any event during nearly all of those times at which the Intertie would otherwise be so overloaded with Northwest imports as to be unable to accommodate Hydropool's output (App. U, pp. 9-10, V, pp. 4, 6; App. X, pp. 37, 49, 52, 358-65, 368-72). In any case, it was also shown that PG&E's plans for long-term capacity enhancements included an expansion of the capacity of the Intertie sufficient to accommodate all of Hydropool's output, so that any difference that might exist between Hydropool and the California QFs in this respect would be temporary at most (App. U, p.12, att. 10; App. X, pp. 37, 42-44).

For its part, Hydropool presented expert testimony corroborating the lack of any genuine difference between the situations of Hydropool and the California QFs. In addition, Hydropool's principal officer testified that he had offered to PG&E, and would still offer, to negotiate special arrangements with the Northwest utilities who would be "wheeling"

Hydropool's output to PG&E whereby this output would be "banked and stored" during periods in which the Intertie was fully loaded with economy imports (App. X, pp. 834-41). In this manner, Hydropool's deliveries could be diverted from the Intertie to avoid displacement of economy power under the same circumstances in which PG&E could accomplish this result with respect to power delivered by California QFs over its own transmission lines (id.).

Based on all of this testimony, the administrative law judge found as follows (App. O, p. 8):

> "From these facts, one may find a few differences between QF interconnection to the Intertie and to other constrained transmission lines. ... [D]irect interconnection to the Intertie obviously will displace economy power whenever such power is available to fill PG&E's capacity entitlement. Interconnection to other transmission lines will cause displacement only when such power is available and uncurtailed area generation exceeds area load. Consequently, the amount of displacement from QF interconnection to the Intertie may exceed any Intertie backoff caused by other QF interconnection to other lines."

The judge concluded, however, that these

"differences" were insufficient to justify a recommendation that the Commission exclude Hydropool from the terms of the interim solution, and he therefore simply forwarded the record to the Commission without any ruling one way or the other on the question whether PG&E's and IEP's petition for this relief should be granted (id., p. 9).

The Commission's final ruling on the petition was rendered in the same decision in which it established its guidelines for the long-term alleviation of the overall problems created by PG&E's transmission constraints (App. B). In the portion of its opinion relating to the petition to exclude Hydropool, the Commission candidly acknowledged that the issue raised by the petition was nothing more nor less than the "general question of the terms and conditions, if any, under which out-of-state QFs should be allowed interconnection" to PG&E's transmission system (id., p. 16a). The Commission proceeded to resolve that issue against Hydropool in a brief discussion which merely parroted the findings of the

administrative law judge, held that these findings afforded "a rational basis" for excluding Hydropool from the interim solution, granted PG&E's and IEP's petition for that relief, and directed the commencement of a new proceeding to investigate any further "unresolved questions relating to the desirability of purchasing power from out-of-state QFs" (id., pp. 16-17a). Because of the Commission's intervening ruling in the "orphan contracts" case to the effect that the validity of Hydropool's standard offer contracts would depend upon its eligibility to participate in the interim solution, the Commission's denial of that right to Hydropool in this decision necessarily had the further effect of abrogating those contracts. One commissioner dissented from the Commission's ruling (id., p. 18).

6. The Proceedings Below. Hydropool petitioned for rehearing of the Commission's decision, raising all of the legal and constitutional arguments which are raised in this proceeding (App. P). The Commission

failed to act on the petition within 60 days of its filing, and it was therefore deemed denied by operation of law. Cal. Pub. Utils. Code §1733(b). Hydropool and Cogeneration Services then filed a petition for review of the decision, on all the same grounds, in the California Supreme Court, which is the only tribunal empowered to review the Commission's decisions under California law (App. Q). Id. §1759. Three weeks after the filing of this petition, and while the Commission's counsel were in the process of preparing its response, the Commission spontaneously issued a new order, ostensibly addressed to Hydropool's earlier petition for rehearing which it had already effectively denied (App. L). This new order, however, made no change whatsoever in the substance of the Commission's ruling, but rather merely attempted to "clarify" it by expounding various protestations of innocent intent with respect to the apparent discriminatory character of the ruling (id.).

Hydropool's petition for review of the Commission's decision was thereafter denied

without opinion by the state Supreme Court, with one justice dissenting (App. A). As stated above, this denial was the equivalent of a ruling on the merits affirming the decision under California law (see authorities cited at page 2, supra). This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

1. The Commerce Clause. The standards for determining the validity of state regulations challenged under the Commerce Clause are well settled and may be briefly stated. In its recent opinion in Maine v. Taylor, __ U.S. __, 106 S.Ct. 2440 (1986), this Court summarized those standards as follows (id. at 2447-48):

> "In determining whether a state has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are 'clearly excessive in relation to the putative local benefits,' Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny. The Court expained in Hughes v. Oklahoma, 441 U.S. 332, 336 (1979), that once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the state to

> demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means. See, also, e.g., Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 957 (1982); Hunt v. Washington State Apple Advertising Comm'n., 432 U.S. 333, 353 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951)."

The ruling of the Commission at issue here clearly falls within the latter of the two categories enumerated by the Court in this passage - that is, state regulations that affirmatively discriminate against interstate commerce. The Commission itself frankly conceded as much when it characterized the petition to exclude Hydropool as presenting "the general question of the terms and conditions, if any, under which out-of-state QFs should be allowed interconnection" with the transmission lines of California utilities (App. B, p. 16a). And in any event, since "[t]he Commerce Clause forbids discrimination whether forthright or ingenious" (Best & Co. v. Maxwell, 311 U.S. 454, 455-56 (1940)), the same conclusion would follow even if the Commission had acceded to PG&E's and IEP's suggestion that it eschew candor and couch its order as a

facially neutral exclusion of "QFs located outside PG&E's service territory whose power output would flow on the ... Intertie north of Round Mountain Substation" (App. N, p. 5). For, as was shown above, the only point of connection to the Intertie "north of Round Mountain Substation" also happens to be the only practical point of entry into PG&E's system for power generated by QFs situated outside California and is not a practical connection point for any QF situated within the state (App. U, att. 1). Thus, whatever formulation is chosen, the ultimate effect of the Commission's ruling is to exclude out-of-state QFs from participating in sales of power to PG&E on the terms and conditions which are simultaneously being offered to QFs located in California. As such, the ruling is plainly discriminatory and, under the decisions of this Court, must therefore be deemed to "invoke the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." Hughes v. Oklahoma, supra, 441 U.S. at 337. Accord,

Maine v. Taylor, supra.

The record in this case leaves little doubt that the Commission's order cannot survive such strict scrutiny. As for any "legitimate local purpose" that might have been served by the order, the previous decisions of the Commission itself have eliminated nearly all of the arguably legitimate local concerns that might have satisfied this requirement. Thus, while it is true that Hydropool and other out-of-state QFs may displace economy imports from the Northwest utilities under certain circumstances, the Commission has consistently ruled, in assessing the same effect arising from deliveries of power by California QFs, that this factor is not sufficient to justify refusing such deliveries in the light of the overriding interest in encouraging the development of QF power (App. C, pp. 72-78; App. D, p. 114; App. E, p. 38; App. H, pp. 8-9). Similarly, although Hydropool's power would need to be "wheeled" to PG&E over the transmission lines of other utilities, the Commission has repeatedly determined, in

adjudicating the rights of California QFs to deliver power to utilities from outside their service territories, that any burden on the purchasing utility that might attend this practice is overborne by both the express mandate of the FERC regulations and the ability of "wheeling" to "make a material contribution to cogeneration and small power production in California" through the "introduc[tion of] actual competition into the market" (App. C, p. 110; see also App. H, pp. 8-9). Finally, while the Commission has found that the limited capacity of PG&E's transmission system imposes some real short-term constraints on QF development in its northern territory, it has nevertheless required PG&E to continue accepting deliveries of QF power in that area within certain prescribed limits, and has specifically reaffirmed that these constraints do not afford an excuse for PG&E to refuse such deliveries whenever they would displace economy imports or require "wheeling" from out-of-area QFs (App. H, pp. 8-9). Thus, while all of these problems might have been deemed to

constitute "legitimate local purposes" for the exclusion of Hydropool's output from the market in other possible circumstances, the Commission's own denial of their legitimacy in the context of its adjudications of the rights of California QFs has decisively foreclosed each of these potential avenues of defense for the validity of the ruling in question here. If anything, the existence of these factors and the Commission's treatment of them in its various earlier decisions has merely served to heighten the discriminatory impact of that ruling.

The only remaining possible justification for the Commission's discrimination against Hydropool is the finding of the administrative law judge regarding the significance of the fact that deliveries from out-of-state QFs would enter the Intertie at a point at which no other PG&E transmission lines are connected. As noted above, he found that this circumstance might entail a proportionally greater displacement of economy power under some circumstances than the displacement caused by

California QFs whose output would enter the Intertie at other points at which it could sometimes be diverted to other lines during periods of overload. As was demonstrated earlier, however, the practical effect of this distinguishing factor was trivial at best, because PG&E's other lines would normally be fully loaded and consequently unavailable for such diversion at precisely those times at which the Intertie itself was overloaded. The output of the California QFs would therefore generally displace economy power in the same manner as Hydropool's output, and the ultimate financial impact of this displacement on California's ratepayers would be vastly greater in absolute terms than anything that might ensue from the acceptance of Hydropool's deliveries. The judge himself accordingly held that this factor was insufficient to justify a recommendation to exclude Hydropool from the terms of the interim solution (App. O, p. 9). The Commission likewise afforded only passing mention to this concern in its ultimate decision granting PG&E's and IEP's petition for

this relief, and chose instead to ground its ruling upon a broadly phrased catalog of "the problems of how to deal with out-of-state QFs" (App. B, p. 16a).

Given these implicit acknowledgments of the insignificance of this alleged distinguishing factor, it can hardly be accorded sufficient weight to justify the Commission's otherwise patently discriminatory order. At most, as the Commission itself appeared to concede in its opinion, this factor might be viewed as furnishing the sort of minimal "rational basis" that might sustain the order against a challenge under the Equal Protection Clause. However, as this Court explained in its recent opinion in Metropolitan Life Ins. Co. v. Ward, __ U.S. __, 105 S.Ct. 1676 (1985), that relatively lax standard has no place in the very different context of Commerce Clause adjudication, where the state's asserted interest in the challenged regulation must additionally be "weighed against the burden the state law would impose on interstate commerce." Id. at 1683. See e.g., Lewis v. BT Investment

Managers, Inc., 447 U.S. 27, 42-44 (1980); Hunt v. Washington State Apple Advertising Comm., supra, 432 U.S. at 352-53; Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970). When it is further recalled that any claimed justification for an affirmatively discriminatory regulation must be subjected to "the strictest scrutiny" with respect to both its importance and the motives for its assertion, there can remain no serious question that the minor technical differences in transmission methods cited by the administrative law judge cannot serve as a sufficiently consequential "legitimate local purpose" to justify the ruling at issue here. Lewis v. BT Investment Managers, Inc., supra; Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Hughes v. Oklahoma, supra; Pike v. Bruce Church, Inc., supra.

In any event, even if this factor could fulfill the role of a "legitimate local purpose," appellees plainly could not clear the additional hurdle erected by the requirement of an "absence of nondiscriminatory alternatives"

for the promotion of the state's interests. Hughes v. Oklahoma, supra, 441 U.S. at 337; Maine v. Taylor, supra, 106 S.Ct. at 2447-48. In fact, the record in this case abounds with suggestions of alternative nondiscriminatory means by which those asserted interests might have been served, most of which, once again, emanate from the opinions of the Commission itself. Thus, for example, the Commission determined at the outset that exclusion of the output of particular QFs or refusals to accept particular power deliveries were not a proper response to the problem of displacement of economy imports, because this problem could be solved by simply taking such displacement into account in calculating each utility's system-wide avoided cost for the purpose of determining the price to be paid under its standard offers (App. C, pp. 72-78). Similarly, when the Commission was later faced with the exacerbation of this problem caused by PG&E's limited transmission capacity, it specifically rejected PG&E's request to exclude out-of-area QFs from the interim solution as a

means of avoiding additional displacement of economy power, and instead chose to resolve this difficulty by simply imposing a maximum limit on the quantity of QF power that PG&E would be required to accept pending the alleviation of these constraints (App. H, pp. 8-9). Finally, an additional, fully effective method of avoiding any adverse effects that might particularly ensue from the acceptance of Hydropool's output was proposed by Hydropool's principal witness, who, as noted earlier, offered to negotiate arrangements with its "wheeling" utilities whereby Hydropool's power could be "banked and stored" during conditions of overload on the Intertie so as to resolve the displacement problem in precisely the same manner that PG&E was attempting to resolve it by diverting the output of California QFs onto other transmission lines of its own (App. X, pp. 834-41).

All of these alternative methods of advancing the state's interest in preserving economy imports were found acceptable, indeed wholeheartedly embraced, by the Commission in

adjudicating the rights of California QFs. Only in the "special case" of Hydropool did the Commission choose, without explanation, to reject these alternatives in favor of a blanket exclusion of Hydropool from the terms of the interim solution and a complete abrogation of its purchase contracts with PG&E. The conclusion is unavoidable that this action on the part of the Commission represented "a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively." Hughes v. Oklahoma, supra, 441 U.S. at 338. Accord, Hunt v. Washington State Apple Advertising Comm., supra, 432 U.S. at 354.

Thus, under the rules enunciated in the opinions of this Court, the decision of the Commission plainly violates the Commerce Clause and indeed represents a classic instance of precisely the sort of parochial exclusionary measure that this constitutional provision was intended to prohibit. When all is said and done, the evident import of the Commission's

decision, if not its conscious intention, is to deny access by out-of-state power producers to California's electrical transmission facilities, to insulate California's small power production industry from out-of-state competition, and to relieve California's ratepayers from their share of the burden of contributing to the national objective of developing alternative sources of energy. All of these types of illegitimate purposes and effects have been condemned by this Court in many prior cases, and they should suffer the same censure in this case. E.g., New England Power Co. v. New Hampshire, 455 U.S. 331 (1982); Lewis v. BT Investment Managers, supra; Philadelphia v. New Jersey, supra; Hughes v. Oklahoma, supra; Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Baldwin v. Seelig, 294 U.S. 511 (1935).

The ruling of the Commission, moreover, reflects more than mere error or injustice to appellants. In addition - and this is the reason the issue particularly merits plenary consideration by the Court - the Commission's

action threatens the complete frustration of an important national program. As noted above, the purpose of the congresssional enactment mandating the promotion of cogeneration and small power production, from which the Commission ultimately derived its authority to adopt the regulations at issue here, was to alleviate a nationwide dependence on foreign oil imports that was perceived as undermining the national security and international influence of the United States. FERC v. Mississippi, supra, 456 U.S. at 745-46, 755-57. For obvious reasons, this preeminently national goal can be effectively advanced only if the various states pursue a cooperative approach in which the more populous states that are most likely to provide a market for such alternative forms of energy agree to open their borders to the importation of power from the resource-rich states in which that power can be most efficiently generated. By the action of the Commission in this case, California has rejected this approach in favor of a parochial policy that seeks only the advancement of its

own isolated interests. Although it has enthusiastically endorsed the goal and accepted the costs of promoting alternative energy production within its own borders, it has refused access to its markets and its transmission facilities by competing small power producers in its neighboring states, even while it has continued to avail itself of the benefits of cheap hydroelectric power from those states' major utilities. It is, in other words, pursuing a program of energy self-sufficiency for California while frustrating the achievement of that same objective for the nation as a whole. Quite plainly, if its insular approach were to be sanctioned by this Court and imitated by many other states, the entire objective of the congressional enactment would be set at naught. It is to prevent this untoward result, as well as to remedy the Commission's denial of Hydropool's constitutional rights, that the Court ought to accept this case for plenary review.

2. The Contract Clause. The inducement for the Court to entertain appellants' Contract

Clause claim is quite different from the reason that justifies review of their Commerce Clause claim. The latter claim, as was just demonstrated, involves an obvious violation of well settled constitutional requirements. The claim under the Contract Clause, by contrast, admittedly depends upon principles that are anything but well settled. It is for that very reason, however, that plenary consideration of this claim is nevertheless warranted. As will now be shown, an undesirable degree of uncertainty presently afflicts the law in this area of constitutional jurisprudence, and the particular facts of this case happen to afford an ideal opportunity for the resolution of much of this uncertainty.

The course of judicial interpretation of the Contract Clause has not run smooth. From its position of prominence in nineteenth century constitutional doctrine, the Clause was later reduced to such a state of "comparative desuetude" in the middle decades of this century that one respected commentator was led to observe that it might as well have been

"dropped out of the Constitution." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978), quoting Hale, The Supreme Court and the Contract Clause, 57 Harv.L.Rev. 852, 890-91 (1944). The clause was given renewed vitality, however, by two decisions in the 1976 and 1977 terms of this Court, in which the Court declared that "the Contract Clause ... is not a dead letter," and proceeded to apply it to invalidate a New Jersey law repudiating a state's covenant with the bondholders of a port commission and a Minnesota law retroactively increasing the pension funding obligations of certain classes of employers. Allied Structural Steel Co. v. Spannaus, supra at 241; United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). But the extent of this renascence was in turn cast in doubt by another pair of decisions in the 1982 term, in which the Court upheld, against Contract Clause challenges, state laws imposing a price ceiling on natural gas purchases and prohibiting a contractually mandated pass-through from producers to royalty owners of certain newly enacted severance taxes

on oil production. Exxon Corp. v. Eagerton, 462 U.S. 176 (1983); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983).

As is perhaps inevitable in any area of the law in which results are dictated by a "balancing test," these four most recent decisions of this Court under the Contract Clause are not easy to reconcile and produce no clearly intelligible standard of validity for state laws challenged under this provision. All four opinions undertook the same task of "harmonizing" the "facially absolute ... language of the Contract Clause against the State's interest in exercising its police power;" and each opinion reviewed the same set of "relevant factors" in carrying out this task. E.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra at 410, 411-12, 417-19; United States Trust Co. v. New Jersey, supra at 15, 21, 28-31. Nevertheless, the results of the decisions and the apparent weight given to these various "factors" in reaching those results differ markedly between

the 1976-77 decisions and the two decisions rendered in the 1982 term. Compare, e.g., United States Trust Co. v. New Jersey, supra at 29-31, and Allied Structural Steel Co. v. Spannaus, supra at 247, with Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra at 411-12.

This apparent disparity has engendered a similar divergence in the lower courts' approaches to Contract Clause issues and has invoked much speculation and disagreement in the legal community regarding the present content of the principles that should govern the disposition of claims asserted under that Clause. Compare, e.g, Troy, Ltd. v. Renna, 727 F.2d 287, 296-97 (3d Cir. 1984), with Minnesota Assn. of Health Care Facils. v. Minnesota Dept. of Welfare, 742 F.2d 442, 450-51 (8th Cir. 1984). See Epstein, Toward a Revitalization of the Contract Clause, 51 U.Chi.L.Rev. 703 (1985); Note, Rediscovering the Contract Clause, 97 Harv.L.Rev. 1414 (1984). On the one hand, some observers have maintained that the decisions in the 1982 term represent nothing

less than a reinterment of the Contract Clause that effectively relegates the two earlier decisions to the status of mere "traces" of revived judicial concern for Contract Clause values which have "fade[d] as quickly and quietly as they appear[ed]." Epstein, supra, 51 U.Chi.L.Rev. at 703-4. Others, however, have adopted a more sanguine view that seeks to derive a consistent rule from the two pairs of decisions, and to preserve something of the constitutional guarantee, by pointing to various distinguishing factors that plausibly explain and reconcile these decisions' disparate results. E.g., Note, supra, 97 Harv.L.Rev. at 1427-29.

The distinguishing factors most prominently relied upon to support this latter viewpoint are (1) the differing degrees to which the state had induced the challenging party, in each of these cases, to "arrange [his] affairs with conscious reliance on preexisting legal rights," and (2) the degree to which the challenged legislation in each case appeared to impose special burdens on "narrow, identifiable

classes," especially those enjoying little political power at the local level. E.g., id., 97 Harv.L.Rev. at 1428. See Minnesota Assn. of Health Care Providers v. Minnesota Dept. of Welfare, supra at 451. Thus, it has been pointed out that United States Trust Co., supra, and Allied Structural Steel Co., supra, involved, respectively, a state's repudiation of its own express promise and an unexpected entry by the state into a previously unregulated area of its economy, while Energy Reserves Group, supra, and Eagerton, supra, involved the mere continued regulation of activities that were already heavily regulated and as to which the parties could reasonably have expected continued assertions of the state's power to adjust their rights to changing conditions. Id.. Similarly, it has been correctly observed that the laws at issue in U.S. Trust and Allied were both narrowly aimed at the alteration of a particular group's contractual rights, while Energy Reserves and Eagerton dealt instead with laws that were primarily prospective and general in their

scope and that only incidentally effected a modification of existing agreements. Id.. On the basis of this analysis, it is concluded, by those espousing this view, that all of these cases can be reconciled, and that the renewed judicial willingness to enforce the Contract Clause that was manifested in the earlier pair of decisions is therefore still viable, having merely been qualified in certain respects, rather than nullified, by the two decisions rendered five years later. Id..

This case affords an ideal vehicle for this Court to resolve the existing uncertainty on this issue by clearly indicating whether the view just stated is correct and whether the Court's decisions can indeed be reconciled in this manner, or whether, on the other hand, the Court's earlier indications of renewed interest in enforcement of the Contract Clause have, after all, simply "fade[d] as quickly and quietly as they appear[ed]." Epstein, supra at 704. For the facts of this case exhibit, in the most vivid possible manner, both of the factors by which such a reconciliation of these

decisions could be undertaken if the Court were so minded.*

Thus, first of all, these facts probably exemplify a more deliberate inducement by a state agency of "conscious reliance on preexisting legal rights" than has ever been presented in any case before this Court. Compare Wood v. Lovett, 313 U.S. 362, 371 (1941). The Commission in this case not only expressly promised that Hydropool's standard offer contracts, once executed and tendered, "will not be subject to retroactive change based on prospective developments," but also issued this guarantee for the declared purpose of eliminating any "hesitation by lenders because of uncertainty" regarding the enforceability of these contracts, and of thus deliberately inducing the very substantial

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* It should be noted, by way of disposing of one potential threshhold issue presented by these facts, that the order of the Commission at issue here is clearly a "law" within the meaning of the constitutional prohibition against any "Law impairing the Obligation of Contracts." Appleby v. Delaney, 271 U.S. 403, 413-14 (1926); Atlantic Coast Line R.Co. v. Goldsboro, 232 U.S. 548, 555 (1914); Grand Trunk Western R.Co. v. Railroad Comm., 221 U.S. 400, 403 (1911).

investments that Hydropool eventually made in reliance on this promise (App. E, pp. 3, 39-40). Compare United States Trust Co. v. New Jersey, supra at 18, 31-32. In addition, being mindful of the fact that investors might feel a particular hesitancy to commit their capital to a highly regulated industry that was traditionally subject to continuous governmental oversight, the Commission went out of its way to reassure them on this score by expressly disclaiming its authority in this regard and by specifically ordering the utilities to delete from their standard offers a clause that would have preserved its customary regulatory prerogatives (id.). Compare Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra at 411, 416.

Similarly, with respect to the second factor that might serve to reconcile the Court's decisions on these issues, this case clearly involves a ruling that has worked to the particular detriment of a "narrow, identified class" of politically disadvantaged entities. The immediate effect of the ruling

was to abrogate the contracts of Hydropool and Cogeneration Services alone, a narrower class than which can hardly be imagined. Compare Allied Structural Steel Co. v. Spannaus, supra at 247-48. And even though the broader purpose of the Commission's order is to prescribe an exclusionary rule for out-of-state QFs in general, that class, although certainly more numerous, is no less disadvantaged by its relative inability to influence the local political process in such a way as to alleviate the discrimination that has been perpetrated against it. Compare United States Trust Co. v. New Jersey, supra at 61-62 (Brennan, J., dissenting). See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 151 (1978) (Blackmun, J., dissenting).

In short, if there is any remaining vitality in the protections afforded by the Allied and U.S. Trust decisions against a state's betrayal of the deliberately induced expectations of a narrow class of credulous investors, this case affords the opportunity for this Court to indicate as much. By

accepting the case for plenary review, the Court can resolve the existing uncertainty on this issue and give the lie to those skeptics who have doubted whether even this much remains of those decisions. The Court should not shun this opportunity.

CONCLUSION

For these reasons, appellants respectfully submit that the Court should note probable jurisdiction of this appeal and set the case for briefing and argument on the merits.

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Respectfully submitted,

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